757.

SUPREME COURT OF THE UNITED STATES.

No. 149.

JOHN MAXWELL, APPELLANT,

vs.

JOSEPH S. KENNEDY AND AL.

ON APPEAL FROM THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF ALABAMA.

INDEX.

	Original.	Print
Bill of complaint	1	2
Exhibit A	13	7
" B	15	9
" C	16	9
Subpœna	29	15
Demurrer to bill	30	16
Leave to amend bill	30	17
Decree	31	17
Appeal prayed and allowed	31	17
Appeal bond	32	17
Clerk's certificate	33	18

J. & G. S. Gideon, printers.

Pleas had before the hon. the circuit court of the United States, for the fifth judicial circuit and southern district of Alabama, at a term thereof begun and held, in and for said district at Mobile, on the fourth Monday of December, in the year of our Lord one thousand eight hundred and forty-four. Present, his honor William Crawford, judge of said court.

Be it remembered, that heretofore, to wit, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and forty-four, John Maxwell filed in said court his bill of complaint against Joseph S. Kennedy, Jesse Carter, Mary L. Carter, Daniel E. Hall, and Delphine Hall, and Martha Kennedy, in the words and figures following, to wit:

To the judges of the circuit court of the United States for the southern district of Alabama:

John Maxwell, administrator de bonis non of Robert Maxwell, deceased, the said John Maxwell being a citizen of the State of South Carolina, brings this his bill of complaint against Joseph S. Kennedy, Jesse Carter, Mary L. Carter, his wife, Daniel E. Hall and Delphine Hall, his wife, and Martha Kennedy, who are citizens of the State of Alabama. And thereupon your orator complains and says, that on the tenth day of November, in the year of our Lord one thousand seven hundred and ninety-seven, in the court of common pleas of said district, then known and called the district of Washington, in the State of South Carolina, Robert Maxwell, the intestate of your orator, recovered in an action of slander against one William Ebenezer Kennedy a judgment for the sum of one thousand pounds sterling, being equal in the present legal currency of the United States to the sum of about dollars; and also the further sum of one hundred and fourteen pounds nine shillings and two pence, equal in the same legal currency to about dollars, which said judgment is in your orator's possession, and ready to be produced, as your honors may direct.

And your orator further sheweth to your honors, that no part of the amount of the said judgment has ever been paid, but the said judgment remains wholly unpaid and unsatisfied, and in full force.

Your orator further sheweth unto your honors, that although the lapse of time since this judgment was recovered has been sufficient to create prima facie presumptive bar of payment at law, yet the circumstances which your orator will submit, are, as he is advised and believes, abundant to repel such presumption, and to entitle your orator to relief in this honorable court.

Your orator further sheweth, that, at the time of the recovery of said judgment, the said William Ebenezer Kennedy was a resident citizen of the said State of South Carolina, in the said district of Washington, now a part of the district of Greenville, but wholly without any proper-

ty or estate whereupon the said judgment could be executed, and the amount thereof realized.

Your orator further sheweth, that, immediately after the rendition of said judgment, to avoid the service of a capias ad satisfaciendum, which issued thereon, as well as to shew an apprehension by the sheriff of said district, who was in pursuit of him on an indictment for the murder of the said Robert Maxwell, the said William E. Kennedy fled the said State of South Carolina, nor returned until some two or three years afterwards, when he was brought back, on the requisition of the executive of said State, from the State of Georgia, whither he had fled, to stand his trial for said murder. That at the time of said trial, his circumstances had in nowise improved; and immediately thereafter, being acquitted, he again returned to the said State of Georgia, where he remained for four or five years, in the most indigent and needy circumstances, and leading, during the whole period of his stay in said State of Georgia, a thriftless, wandering, and improvident life, utterly insolvent, and without the means of paying his debts; and your orator charges that, for this reason, no effort was or could have been successfully made to collect from the said Kennedy the amount due on said judgment while he sojourned in the State of Georgia. And your orator further sheweth unto your honors, that some time in the year the said Kennedy left the State of Georgia in the same indigence and want of property in which he went there; and whither he went, or where he resided, after his departure from the said State, was entirely unknown to your orator; or, as your orator is satisfied from the pains taken to discover it by the then administrator (of said Robert Maxwell, since deceased,) to any other person in the district of South Carolina, where the said Kennedy had resided before he left the last mentioned State. And your orator further sheweth and charges, that it was generally believed by the friends and former acquaintances of said Kennedy, that he had gone beyond seas and *and* died in parts unknown, until about three years before his death, when some time in the year 1822, it was ascertained and discovered that he was still living, and had taken up his residence in the city of Mobile. Your orator further sheweth unto your honors, that at the time when it was discovered that the said Kennedy was still living, and in the city of Mobile, he had in his own name, or otherwise belonging to him, so far as was known, or could be ascertained, no property whatever, and was in fact residing with his brother, one Joshua Kennedy, since deceased, and apparently wholly dependent upon his bounty for support. And your orator further sheweth, and so charges, that at the time the said William E. Kennedy emigrated to Mobile, it formed a component part of what was then the Territory of West Florida, foreign to the United States, and under the dominion of the crown of Spain, between which and the United States, and in particularly with the part of South Carolina where the then administrator of said Robert Maxwell and your orator resided, little or no intercourse existed; nor was there, up to a considerable period after the said territory had been

ceded to the United States, until about the period before mentioned, when it was discovered that the said Wm. E. was still living.

Your orator further sheweth, that he has since discovered that, subsequent to the settlement of said Wm. E. in said territory, and while it was yet a Spanish province, during the year 1806, he acquired an imperfect title to a considerable amount of real estate, more particularly described in the deeds of conveyance hereinafter mentioned and referred to, which, however, at that time of little value, not exceeding probably the sum of dollars; but your orator expressly charges, that, not only was such acquisition of property, but even the existence of said Kennedy, at the time said property was acquired, during the whole period in which he held it, wholly unknown to the then administrator of Robert Maxwell, and to your orator, but also to any other person in the district where he, the said Kennedy, had resided.

Your orator further sheweth and so charges, that on or about the 13th day of December, 1824, and before it had been discovered by your orator, or any other person interested in, or authorized to prosecute, said judgment to a recovery, where said William E. Kennedy was, or whether he was still living, or had any property whatever, he conveyed by a deed in fee simple all the real estate he possessed, which composed all the property of any value he owned, to his brother, the said Joshua Kennedy, for the nominal consideration in said deed expressed, of ten thousand two hundred dollars, but which your orator has been informed and believes never was paid, the said deed having been made on a secret trust and confidence known only to the two said brothers; that the estate therein mentioned was to be held and employed by said Joshua for the benefit of said William E., and his heirs and representatives; a copy of which deed, marked A, is herewith filed as an exhibit to this bill, and prayed to be taken as a part thereof.

And your orator sheweth, that it was not until after the date of this conveyance, that it was discovered by the administrator, since deceased, of said Robert Maxwell, that said William E. Kennedy was living and residing in said city of Mobile; and that when it was so discovered, to wit, some time in the year the said William E. was wholly without property, having disposed of all his real estate by the deed aforesaid, and having no personal estate or effects than the small portion hereinafter mentioned.

Your orator further sheweth, that, some time in the year 1805, and while the said territory was a Spanish province, the said William E. intermarried with a female subject of the Crown of Spain, who owned considerable real and personal estate; all of which, however, before marriage, he caused by a marriage settlement to be settled upon her.

Your orator further sheweth, that on the *day of* 9th April, A. D. 1825, the said William E. departed this life, leaving, so far as was known, until recently, (within the last two or three years,) no real property whatever, and a very small amount of personalty; and having left a will without any specification of property, the said Joshua Kennedy was appointed administrator of his estate with the will annexed. That

the said Joshua returned into the orphan's court of the county of Mobile an inventory and appraisement of the personal estate of which said William E. died possessed, from which it appears that the whole value of said personal estate was two hundred and sixty-seven dollars; the whole consisting of a few articles of old furniture and household goods, a few head of cattle, and an old negro woman upwards of sixty years old, and valued at five dollars; a copy of which inventory and appraisement is herewith filed, marked exhibit B, and prayed to be taken as part of this bill.

And your orator charges, that although the said Joshua took no further steps after filing said inventory, than to file subsequently a list of debts due said estate, amounting to about four hundred dollars, and never made any further return whatever of his acts as such administrator, the said estate remaining to this day wholly unsettled; yet to the creditors of said estate, and to the public at large, he represented the said estate as wholly insolvent, alleging that said inventory and list of debts, for neither of which he was ever accountable to said court, comprehended all the property, of every nature, name, and description, of which his said brother died possessed; the said Joshua in fact pretending, and publicly holding it out, and industriously propagating the report up to the time of his own death, which occurred some time during the year 1839, that his said brother, William E., died wholly insolvent, as he had been for many years before his, the said William E's, death; and that he had for many years lived upon his, the said Joshua's, bounty; that even the said real estate before referred to, which was all he ever owned, never was in fact the said William E's property, but was conveyed to him nominally only for the benefit of said Joshua, and only because, at the time of its purchase, he, the said Joshua, being an American citizen, and the laws of Spain not permitting any but Spanish subjects, or such foreigners as had intermarried with female subjects of the Crown of Spain, to hold real estate; and the said William E. Kennedy having so intermarried, and thus became capable of holding real estate in said province, received the titles to said real estate, specified in said deed from said William E. to said Joshua, merely in trust for said Joshua, and with a private though express understanding and agreement between them, that said real estate should be conveyed to said Joshua by the said William E. as soon as he should become capable of holding the same; and that having afterwards, at the date of the said deed, by the annexation of said province to the United States, become so capable, the said deed in pursuance of said trust and agreement was made and delivered; and your orator expressly charges, that these pretences of said Joshua were generally believed by the community, and acquiesced in by the heirs of said William E., until the time hereinafter more particularly mentioned.

And your orator further showeth, that these pretences of said Joshua, with regard to the insolvency of his brother, together with the notorious poverty of the said William E. while his residence was known, his long disappearance and unknown habitation, and the apparent contin-

uance of his indigent circumstances when his place of residence became known to the persons interested in said judgment, prevented any resort at an earlier period than the present, either to a court of law or equity, for the purpose of enforcing the payment of said judgment, either against said William E. while living, or against his heirs or representatives since his decease.

Your orator further charges, that since the death of the said Joshua, on or about the 22d of April, 1839, the heirs of the said William E. Kennedy, to wit, the said Joseph S. Kennedy, Jessee Carter, who had before intermarried with Mary L. Kennedy, (now Mary L. Carter,) Martha Kennedy, and Delphine Kennedy, who, subsequent to the filing of the bill hereinafter mentioned, intermarried with the said Daniel E. Hall, filed their bill in the court of chancery, of the first chancery division and southern district of the State of Alabama, against the heirs and executors of the said Joshua Kennedy, and obtained a decree; which was, on the day of A. D. , confirmed on appeal to the supreme court of Alabama, by which it was adjudged and decreed, that the said deed from the said William E. Kennedy to said Joshua, dated 13th December, 1824, was not made upon any consideration deemed valuable in law, but for the purpose of enabling the said Joshua to secure, for the management of the estates in which he was interested, and to secure an adequate provision for the children of the said William E. Kennedy, his brother; and it was further declared and decreed, that said Joshua and William E. were jointly interested in the lands embraced in the said deed, and that the said heirs of the said William E. were entitled to an amount of the moneys received by the said Joshua in his lifetime, and by his executors, Hallett and Walker, since his death, as trustees for said plaintiffs, upon all sales of land embraced in said deed; and also to an account from said executors of the moneys received by said Joshua Kennedy in his lifetime as guardian of said heirs, and as administrators of the effects which were of the said William E., and that the said heirs be admitted into the possession of the undivided half of the lands embraced in the said deed, which were not sold and conveyed by said William E., or said Joshua, or said Hallett and Walker, and that it be referred to the master to prepare a conveyance to said heirs of said William E., to wit, said Mary Louisa, Joseph S., Delphine, Martha, in [and] of one undivided half of all the lands in said deed mentioned, and not disposed of before the date of said decree; a copy of which said decree is herewith filed, and marked exhibit C, and prayed to be taken as part of this bill.

And your orator charges, that after said decree was rendered, and while the taking of said accounts between said parties was progressing in pursuance of said decree, some time during the past year a compromise was effected, between the heirs and the said executors of said Joshua and the heirs of said William E. Kennedy, whereby the said Joseph S. Kennedy, the said Jessee Carter, (in right of his wife, the said Mary L.,) the said Mary L. Carter, Martha Kennedy, and Delphine Hall, and the said Daniel E. Hall, in right of his wife, the

said Delphine, as the heirs of said William E., have received a conveyance, and have been put in the actual possession and enjoyment of the said half, the said real estate referred to in said decree, and embraced in the said deed of 1824, or a considerable portion thereof; but how much, or of what particular parts or parcels thereof, the said conveyance, not having been placed upon record, your orator is unable to state.

And your orator further sheweth, that since the death of said Joshua no administration has been taken out on the estate of said William E., nor in fact were any personal effects or property of said William E. left in the hands of said Joshua at the time of his death to be administered.

In tender consideration whereof, and in as much as your orator is without remedy by the strict rules of the common law, and can only have adequate relief in equity, where matters of this kind are cognizable and relievable, and that the said Joseph S. Kennedy, the said Jessee Carter and Mary L. Carter, his wife, the said Daniel E. Hall and Delphine Hall, his wife, and the said Martha Kennedy, may be made parties defendants to this bill, and may answer the several allegations thereof on their several and respective corporal oaths, and may discover, and particularly disclose and describe, how much, and what real estate they have received [of] the estate of said Joshua, and by the conveyance and compromise made in consequence thereof, and that the said real estate may be subjected, to the extent to which the same has come to the possession and enjoyment of the said defendants, to the payment of the said judgment; and that the said defendants *they* be held and deemed to pay said judgment to the extent of the real estate they have received, or in default thereof that the same, or so much thereof as may be sufficient to pay the said judgment, with interest, be sold; and that your orator may have such other and further relief as to your honor may seem meet, and the circumstances of his case may require. May it please your honor to grant your orator the writ of subpœna issuing out of this court, and directed to the said defendants in the usual manner, commanding them, by a day therein mentioned, to be and appear before this honorable court, then and there true, full, and perfect answers to make to all and singular the allegations of this bill, and further to stand to, perform, and abide such order and decree therein as shall seem meet to your honors.

LISERNE & HALL,
Comp. solicitors.

Exhibit A.

This deed, made this thirteenth day of December, in the year eighteen hundred and twenty-four, witnesseth: that I, William E. Kennedy, for and in consideration of the sum of ten thousand two hundred dollars, to me in hand paid before the signing and delivery hereof, by Joshua Kennedy, the receipt whereof I do hereby acknowledge, have given, granted, bargained, sold, deeded, and confirmed, and by these presents do grant, bargain, sell, deed, and confirm, unto the said Joshua Kennedy, his heirs and assigns forever, all those following described

tracts, lots, pieces and parcels of land, situate, lying and being in the aforesaid State and county, viz: All that undivided half or moiety of a certain tract, piece or parcel of land, containing about twenty arpens, granted by the Spanish intendant, Morales, to William McVoy, in the year 1806, and conveyed by deed of sale, dated the sixth of May, in the year eighteen hundred and fourteen, from said McVoy to William E. and Joshua Kennedy, and surveyed by order of the surveyor general of West Florida, and bounded, as will appear by reference to the survey of the same made by Joseph Collins, the fourteenth and fifteenth of November, eighteen hundred and six; and also all my right, title, property, possession, interest, claim and demand, both in law and equity, into and for all and every part and parcel of all those two tracts or parcels of land granted by the Spanish government in seventeen hundred and ninety-eight, and in the year eighteen hundred and six, to Thomas Price, containing about eleven hundred arpens, bounded on the north side by lands belonging to John Forbes and Co., east by lands granted Colonel William McCoy, Charles Le Lony, New Street and the river Mobile, south by lands granted to Simon Favre, west by lands granted to Antonio Esfugo, and having such shape, *and having such shape*, marks, quantity, and boundaries, as will appear by reference to the Spanish plat or survey of the same. And also the north half of all that lot, piece or parcel of land, situate at the north-east part of the town or city of Mobile, and originally granted to Alexander Baudain, and bounded on the north by lands granted to John Forbes and Co., on the east side by the river Mobile, on the south side by the south half of the said lot, piece or parcel of land, granted as aforesaid, and now belonging to Samuel Kitchen, and on the west side by Royal street, and having such shape, marks, form and quantity as will appear by reference to the grant of the same. To have and to hold the said granted and bargained premises, with all the appurtenances, privileges, and commodities to the same belonging or in any wise appertaining, to him the said Joshua Kennedy, his heirs and assigns forever, to his and their own proper use, benefit, and behoof, forever. In witness whereof I have hereunto set my hand and seal, the day and year first above written.

WILLIAM E. KENNEDY. [SEAL.]

In presence of—
WILLIAM V. CHAMBERLAIN,
GEORGE HAUPT.

STATE OF ALABAMA, *Mobile county.*

Personally appeared before me, Hugh H. Rolston, clerk of the county court in and for said county, the above named William E. Kennedy, who acknowledged that he signed, sealed, and delivered the foregoing deed, on the day and year therein mentioned, to the said Joshua Kennedy. Given under my hand and seal this 13th day of December, A. D. eighteen hundred and twenty-four.

HUGH H. ROLSTON. [SEAL.]

Exhibit B.

Inventory and appraisement of the personal estate of William E. Kennedy, late of the county of Mobile, in the State of Alabama, deceased.

1 bookcase and drawers, appraised at	$5 00
1 small lot of old books	10 00
1 case surgical instruments	12 00
1 trunk, and sundry old iron tools of Groom	2 00
1 lot of bottles and medicines	2 00
1 silver watch	3 00
1 old gray horse	10 00
1 brown horse	15 00
1 small gray horse	20 00
1 bald horse	25 00
25 head of cattle, more or less, at Bonne Secours, Baldwin county, at $4 00 per head,	100 00
A small lot of hogs at same place	20 00
A lot of tools at same place	5 00
A pine table and a few old chairs	1 00
A lot of pots and ovens	4 00
One double table, clumsy and old	3 00
An old Negro woman, named Ursala or Lucy, upwards of 60 years old	5 00
	267 00

C.

At a term of the court of chancery for the first district of the southern chancery division of the State of Alabama, at Mobile, begun and held on the second Monday of November, A. D. 1840. On the 18th day of November, the same being a day of said term, his honor, A. Bowie, chancellor, presiding, the following entry was made, to wit:

THE HEIRS OF JOSHUA KENNEDY, complainants,
vs.
WILLIAM E. KENNEDY.

This cause was taken up and occupied the day.

And on the 19th of November, A. D. 1840, the same being a day of said term, as follows, to wit: "The argument of the case of Kennedy vs. Kennedy not being concluded, the court adjourned till morning."

Attest, M. J. McRAE, *Register*.

And on the 20th of November, A. D. 1840, the same being another day of said term, as follows, to wit: "The argument in the case of the heirs of Wm. E. Kennedy against the heirs of Joshua Kennedy, not being concluded, the court continued the same until the next day, when the court adjourned."

Attest, M. J. McRAE, *Register*.

And on the 28th day of November, A. D. 1840, the same being another day of said term, as follows, to wit:

JOSEPH S. KENNEDY, Mary Louisa Carter, Delphine Hall, Martha M. Kennedy, heirs of Wm E. Kennedy, complainants,

vs.

Wm. R. Hallet, Robert D. Walker, executors, and Susan Kennedy, Clarissa Kennedy, Sulura Hastie, Joshua Kennedy, Mary Kennedy, Auguste Kennedy, dec'd, heirs of Joshua Kennedy, defendants.

This cause was heard upon bill, answers, and testimony, and was argued by counsel. A degree of importance, far beyond any difficulty which may be supposed to exist in determining its legal principles, is attached to this case, from the vast amount of property involved in it. It has been elaborately and ably discussed. A mass of testimony, unequalled by any thing of the kind the court has ever before witnessed, has been introduced; and the authorities relied upon would, of themselves, constitute a very respectable library. Under these circumstances, with the very limited time which the chancellor has upon the circuit to devote to the preparation of his decrees, coupled with the consideration that it is desired by the parties that a decree should be rendered, so that the case may be removed to the Supreme Court for trial at its approaching session, it will not be expected that I shall enter into a very minute examination either of the territory or the authorities relied on. Indeed, a decree by consent would have answered their purpose equally as well as the most labored decree I should, under any circumstances, be able to pronounce. In reference to the testimony I will remark, that very much of it is either incompetent or irrelevant. But if I were to attempt to go through it, and call the admissible from the inadmissible, the relevant from the irrelevant, I should assume a task as unprofitable as it would be laborious. The counsel themselves will scarcely disagree upon this point; and if they should, the Supreme Court, I am sure, can have no difficulty.

If I have a proper conception of the case, but two questions arise in it, and upon the solution of them the case must turn; these questions are—

1st. Is parol evidence admissible to establish the trust contended for by the plaintiffs, in the face of the absolute deed existing between the parties? And,

2d. If such evidence is admissible, *in* the evidence offered sufficient to establish the trust?

A brief history of the case, and of the relative position of the parties, will be necessary to a proper understanding of the principles involved, and of the evidence applicable to them. At a very early period, and long before the Spanish Government ceased to have possession and jurisdiction of this region of country, Dr. William E. Kennedy, the an-

cestor of the plaintiffs, and his brother Joshua Kennedy, the ancestor of the defendants, were residing here; the former (if I mistake not) always within the Spanish lines, the latter within *the latter within* the American line, in the same vicinity. Dr. Kennedy married a Spanish lady, was a Spanish subject, and seems to have had the reputation of being a physician of some eminence. In character the two brothers were altogether dissimilar. Dr. Kennedy is represented to have been a man fond of ease, careless of wealth, generous to a fault, and of social habits bordering on excess; on the other hand, his brother Joshua was of a shrewd speculating turn of mind, patient in investigation, laborious and untiring in the prosecution of his schemes of aggrandizement, well versed in land titles, particularly Spanish titles, and one of the most successful speculators in land claims that the country afforded. Notwithstanding this dissimilarity of tastes and habits, the two brothers were devotedly attached to each other; their affection for, and confidence in, each other, seems to have been such as does not always exist even between brothers. About the year 1820 Dr. Kennedy lost his wife, and from that time the weaker features of his character stood out in bolder relief. He indulged more freely in social excesses, became more recklessly indifferent to wealth; his generosity was even more uncalculating than before; he broke up his domestic establishment, and from that time until his death, he and his children lived with his brother Joshua. From this time, until his death in 1825, he appears to me to have surrendered himself to a state of to his brother, depending upon him for every thing, although he had means enough of his own, and relying, with the confidence of a child, upon his brother's superior intelligence and industry for the management of his business. The lands, which are the subject of controversy, consist of three distinct tracts or claims; one called the "Price claim," another the "McVoy claim," and a third "the Baudain claim;" the last, however, I believe is covered by the Price claim, and may be identified with it. The Price claim was granted to Dr. Kennedy, the McVoy claim to him and his brother Joshua jointly. Whether Joshua Kennedy originally had any interest in the Price claim or not does not seem to be clear from the evidence; but about the year 1818 or 1819, there seems to have been a deed of partition, (which is now lost,) by which an equal interest in that claim was recognised between the brothers. On the 13th day of Deber, 1824, Dr. Kennedy executed to his brother Joshua an absolute deed, in fee, of all the lands in dispute; and the question is, whether *that deed*, although absolute on its face, was taken subject to a trust in favor of the children of Dr. Kennedy. I shall first consider the legal question arising upon the sufficiency of the evidence. No one can regret more than I do, that the courts have ever departed from the strict letter of the statute of frauds, wise in its conception, and wholesome in its enactments; had it not [been] virtually repealed by the courts, it would have stood, throughout all time, a noble monument to the intelligence of its framers, and an impregnable bulwark around the rights of property. But it is too late now to indulge in vain regrets upon a subject

which has already passed beyond our control. We must take the statute as we now find it, modified and controlled by a long series of judicial interpretations. Before I proceed to a more particular consideration of the legal questions involved in the case, I take occasion to say, that long before the statute of frauds was enacted, there existed a rule of the common law, to which, and not to the statute, much of the argument, and very many of the authorities of the defendants' counsel apply. That parol evidence is inadmissible, to add to, contradict, or vary the terms of a written instrument, was a principle of the common law long before the statute was passed. Correctly understood, that principle relates more particularly to the construction or meaning of contracts. It is founded on the very rational conclusion that, in the case of written instruments, what the parties *intended* they have *expressed*. But the principle never was intended to go the length of establishing the proposition, that because a contract is in writing it is necessarily valid. Although in writing it may be tainted with fraud, or the consideration may have failed, or the contract itself may be against public policy, or in a variety of ways it may be impracticable; it is so invariably true, that it has grown into a legal axiom, that "fraud will vitiate any legal contract;" and it is upon this principle that the courts have acted in all cases, when they are supposed infringed upon the statute of frauds. They have assumed the position, that whenever, by adhering to the letter of the statute, they would permit one man to practise a fraud upon another, they would defeat the very object of the statute itself, and make it an instrument of fraud, instead of a means of preventing fraud. In the case now before the court, the plaintiffs contend, not as might be inferred from the arguments of defendants' counsel, that the deed of 13th December, 1824, between William E. Kennedy and Joshua Kennedy, is fraudulent and void, but that *that* deed truly expresses the intentions of the parties, as far as it goes. That Dr. Kennedy *did* intend to convey the lands mentioned in the deed to his brother Joshua, but that such conveyance was for the purpose of enabling Joshua Kennedy to preserve the estate conveyed for the use of Dr. Kennedy during his life, and for the benefit of his children after his death. In other words, that it was understood and agreed between the parties, that the estate conveyed was taken, subject to a trust in favor of Dr. Kennedy and his children, and that this was understood and acknowledged by Joshua Kennedy at the time, and for a long time afterwards. And whether parol evidence is admissible to establish the fact of this understanding or agreement between the parties, viz., the legal question involved in the case, it is perhaps worthy of remark on this point of the case, that our statute of frauds, which is generally a literal transcript of the English statute, has omitted that part which relates to declarations of trust. I do not know, however, that this fact will materially affect the determination of this case.

I have looked as carefully as my limited time would permit, into the authorities relied upon by both sides, and without pretending to analyze them, I shall merely state the conviction of my own mind upon the le-

gal question. The principle in this court is, that whenever a party attempts to make a fraudulent use of a deed or other instrument for his own benefit, and to the detriment of another party, the court will consider him as a trustee for that other, and thus defeat the fraudulent intention. This court abhors fraud, and will ferret it out with all its means; even in the case of deeds, it will not permit the solemnity of the instrument either to sanctify or cover fraudulent design. If parol be inadmissible to show in this case that the understanding between the parties was, that Joshua Kennedy was to hold the estate in question in trust for his brother and his children, then there is one case in which a most glaring fraud may be practised on a confiding party, and the court has no power to prevent it. I think the authorities are quite the other way; and without entering into a particular examination of them, I refer to 10 Eng. Cond. C. R. 241; 1 Paige, 2 Atk. 254; 4 John. Ch. R. 167, and I might add numerous other authorities which I admit, because I know the case is to go up, and will be again fully argued. See also Robertson's frauds 78, et. seq. At the request of one of the able counsel for the defendants I have carefully looked at the case of Lord Justram vs. Child, and I answer his view of that case by referring him to the opinion of the Lord Chancellor in reference to Justram vs. Child, in the case of the Marquis of Townshend against Stowgroom, reported in 6 Vesey, 328. At the special request of the same able counsel, I have also examined the case of Marks vs. Pell, 1 John. C. R. 594. And I say that *that* case strongly sustains the doctrine which I have laid down as the principle of this decree. The court there held "that parol evidence is admissible to show that an absolute deed was intended *as a mortgage*," and the case evidently went off on the staleness of the demand and long acquaintance of the party. I have also examined most of the other authorities relied upon by the defendant's counsel, but I do not think they sustain the opinions they have assumed.

I am therefore of opinion, that upon authority the parol evidence offered in this case to establish the trust was admissible, notwithstanding the absolute deed. The only remaining question is, does the evidence relied on establish the trust? I am satisfied that it does. Without pretending to review the immense mass of testimony contained in the depositions, I shall merely note that part of it which has convinced my own mind, and which I think leads to the truth of the case. The evidence is to my mind clear beyond a doubt, that some short time before the execution of the deed of 1824, Joshua Kennedy anxiously contemplated and desired that his brother should make over his property to prevent its being wasted by his careless and profligate habits; that frequent conversations were had upon this subject between Joshua Kennedy, and other friends of the Doctor, and generally if not always at the instance of Joshua; that in these conversations Joshua always spoke of the measure as a means of saving the estate of his brother's children. It is also well established by the proof that, very soon after the deed was executed, Joshua Kennedy declared to many of those very friends whom he had consulted before, and to others at various times, that he had succeeded in

his purpose, that the Doctor had made over his property to him, and that now his (the Doctor's,) children would have plenty, that they would soon be rich; in addition to this it is in proof that, as late as the spring of 1829, Joshua Kennedy caused to be inserted in a public newspaper, in Mobile, an advertisement, offering for sale and lease some of the very lands now in dispute, which advertisement (speaking in reference to the lands to be leased,) containing the clause, "at the expiration of which period the property shall revert to the legal heirs and representatives of Wm. E. Kennedy, deceased, and to the undersigned in equal proportions;" see the deposition of Louis Dolive, Sefroy Dolive, S. H. Garrow, Jos. Krebs, Chester Root, Daniel Robertson, Thaddeus Sanford, and the testimony of Lyon and Sibley; I refer also to the answer to the cross bill, which is testimony in the cause.

Without going into a minute examination of the defendant's testimony, I will merely remark that, after a patient consideration of it, does not appear to me that there is any thing in it which, properly understood, contradicts the evidence I have referred to above. And in conclusion, I repeat, that I am satisfied with the proof in this cause that Joshua Kennedy took the estate conveyed to him in 1824, by Dr. Kennedy, under an explicit understanding between the parties, that it was to be held by Joshua in trust for Wm. E. Kennedy and his children, and that to permit the deed to be used for any other purpose would be to permit a fraud. The register will make the following entry in this cause.

This cause came on to be heard on the bill, cross bill, and answers, the exhibits and proofs; after the pleadings and proofs had been submitted, and the argument about to proceed, the plaintiffs in the cross bill asked leave to dismiss the same, which was allowed by the court, reserving the right to the defendants in that bill to the use of the evidence in that case in the same manner as if the bill had not been dismissed; and the principal cause having been fully argued by counsel, it is declared by the court, that it is fully proven that the deed from Wm. E. Kennedy to Joshua Kennedy, dated 13th day of December, 1824, was not made upon any consideration deemed valuable in law, but for the purpose of enabling Joshua Kennedy to secure and provide for the management of the estates in which he was interested, and to secure an adequate provision for the children of Wm. E. Kennedy, his brother; and it is declared that Joshua Kennedy and William Kennedy were jointly interested in the lands embraced in the Price and McVoy claims, and that the Baudain claim was covered by the Price claim.

It is further declared, that the plaintiffs, as heirs of William E. Kennedy, are entitled to an account of the moneys received by said Joshua Kennedy in his lifetime, and by his executors, Hallett and Walker, since his death, as trustee for said plaintiffs, upon all sales of lands embraced either in the Price, McVoy, or Baudain claims; and also to an account from the said Hallett and Walker, of the moneys received by said Joshua Kennedy in his lifetime, as guardian of the plaintiffs, and as administrator of the effects which were of said William E. Kennedy.

And it is ordered, adjudged, and decreed, that the said plaintiffs (children of William E. Kennedy) be admitted into the possession of

the undivided half of the Price and McVoy and Baudain claims, that were not sold and conveyed by the said William E. Kennedy or Joshua Kennedy, or the said Hallett and Walker; and that it be referred to the master to prepare a conveyance to the said plaintiffs, Mary Louisa Carter, Joseph S. Kennedy, Delphine Kennedy, and Martha M. Kennedy, of one undivided half of all the lands in said claim not disposed of before the date of this decree, by the said parties in the said claims mentioned in the deed of 1824, before referred to, which deed shall be executed by the said Hallett and Walker, under the powers contained in the will of Joshua Kennedy, and in pursuance of this decree. And it is referred to the master to state the accounts between the plaintiffs and the defendants, Hallett and Walker, executors, as representing Joshua Kennedy in his several capacities as the guardian of the children of W. E. Kennedy, the administrator of William E. Kennedy, and as trustee under the deed of 13th December, 1824, between William E. Kennedy and Joshua Kennedy; and also to take an account between the plaintiffs and the defendants, Hallett and Walker, an account of land sold or conveyed by the said defendants since the death of said Joshua

And it is further ordered, in taking such account, that the defendants, Hallett and Walker, be allowed all fair credits upon the same; and it is further ordered, that the said Hallett and Walker pay the costs of this suit and the cross suit out of the estate of Joshua Kennedy.

Signed, A. BOWIE, *Chancellor*.

STATE OF ALABAMA, *Mobile county:*

I, Malcolm J. McRae, register of the court of chancery, for the first district of the southern chancery division of said State, hereby certify, that the foregoing ten pages and eight lines contain a true and full transcript of a decree rendered in the foregoing entitled cause at the November term of said court, begun and held at Mobile, on the second Monday of November, A. D. 1840, as the same remains of record in my office.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court of chancery, this twenty-fourth day of February, in the year of our Lord eighteen hundred and forty-four, and of American independence the sixty-eighth year.

Attest: M. J. McRAE, *Register*.

And afterwards, to wit, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and forty-four, the following writ of subpœna was issued from the *the* clerk of the *clerk of* said court, to wit:

UNITED STATES OF AMERICA,

Circuit court of the United States, for the fifth judicial court and southern district of Alabama.

The President of the United States to the marshal of said district, greeting:

You are hereby commanded to summon Joseph S. Kennedy, Jesse

Carter, Mary L. Carter, Daniel E. Hall and Delphine Hall, his wife, who are citizens of the State of Alabama, to be and appear before the honorable the circuit court aforesaid, at the place of holding said court, at rules, in the United States court room, in the city of Mobile, on the first Monday in March next, to answer to the bill of complaint of John Maxwell, administrator de bonis non of Robert Maxwell, deceased, who is a citizen of the State of South Carolina. Herein fail not, and have you then and there this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of said circuit court, this first Monday of February, in the year of our Lord one thousand eight hundred and forty-four.

Issued the 22d day of February, in the year of our Lord one thousand eight hundred and forty-four.

Attest: DAVID FILES,
Clerk C. C. southern district of Alabama.

Received 22d February, 1844, and executed 1st March, 1844.
WILLIAM ARMISTEAD, *U. S. M.*
By C. CUYLER, *D. M.*

Demurrer.

CIRCUIT COURT OF THE UNITED STATES,
Southern district of Alabama:

JOHN MAXWELL, administrator de bonis non,
vs.
JOSEPH S. KENNEDY, JESSE CARTER and wife, DANIEL E. HALL and wife, and MARTHA M. KENNEDY. } In chancery.

The defendants appear to the suit of the said plaintiff, and not confessing or acknowledging any of the facts stated in the bill, they do severally and respectively demur to the same, and for cause of demurrer, that there is no ground of equity averred in the said bill to authorize a decree against them, but the same is wholly insufficient in law to support the prayer for discovery and relief therein contained. For want of sufficient allegations in this behalf they pray judgment, that the said bill may be dismissed at the costs of the plaintiff.

CAMPBELL & CHANDLER,
For defendants.

And afterwards, to wit, at a term of the circuit court of the United States, for the fifth judicial circuit, and southern district of Alabama, begun and held in and for said district, at Mobile, on the fourth Monday of December, in the year of our Lord one thousand eight hundred and forty-four, the following proceedings were had, to wit:

MAXWELL, administrator,
vs.
CARTER et al.

It is ordered by the court, that the complainant have leave to amend his bill of complaint, and that this cause be continued.

And afterwards, to wit, on the ninth day of May, in the year of our Lord one thousand eight hundred and forty-five, being a day of a term of said court begun and held in and for said district, at Mobile, on the third Monday of April, in the year of our Lord one thousand eight hundred and forty-five, the following proceedings were had, to wit:

JOHN MAXWELL, administrator,
vs.
JESSE CARTER et al.

This day came the parties, by their solicitors, and this cause coming on to be heard upon bill of demurrer, it is thereupon ordered, adjudged, and decreed, that the demurrer of the said defendants be sustained, and that the said bill of complaint be *be* dismissed, and that the said complainant pay the costs of this suit.

And afterwards, to wit, on the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and forty-six, being a day of a term of said court begun and held in and for said district, at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and forty-six, the following proceedings were had, to wit:

JOHN MAXWELL, administrator,
vs.
JESSE CARTER et als.

This day came the complainant, by his solicitors, and prays an appeal from the decree rendered in this cause at the last April term of this court; which said appeal, as prayed, is granted, upon the said complainant's entering into bond and security, in the sum of two hundred dollars, for the payment of the costs of his said appeal.

Bond.

UNITED STATES OF AMERICA.

Circuit court of the United States, for the fifth judicial circuit and southern district of Alabama:

Know all men by these presents, that we, John Maxwell and Joseph W. Liserne, are held and firmly bound unto Joseph S. Kennedy, Jesse Carter, Mary L. Carter, Delphine Hall, Daniel E. Hall, and Martha Kennedy, in the just and full sum of two hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we, and each of us, bind ourselves, and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twenty-fourth da-